The Honorable Frederick W. Fleming
Hearing Date: November 16, 2011
Hearing Time: 1:30 p.m.
Hearing Location: Pierce County Superior Court

STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

AMBER WRIGHT,

Plaintiff,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Defendant.

NO. 10-2-08114-9

DEPARTMENT'S RESPONSE TO PLAINTIFF'S PETITION FOR STATUTORY PENALTIES, ATTORNEY FEES AND COSTS

I. INTRODUCTION

On September 1, 2011, this Court found that Defendant, Department of Social and Health Services (DSHS), withheld three records in violation of the Public Records Act (PRA) and is entitled to penalties and costs under the PRA. All three of these records were provided to Plaintiff prior to this PRA lawsuit. In fact, this PRA lawsuit has not caused a single additional record to be produced to the requester. Yet, Plaintiff is now seeking the incredibly inflated sum of $636,396.87 for penalties and costs. These enormous amounts are not supported by law and are inconsistent with other PRA judicial determinations.

With regard to the daily penalty, this Court is not required to apply a separate daily penalty to each individual record that was found to be improperly withheld. Plaintiff is asking

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

this Court to award the $100 daily maximum penalty for the audio recording, and she then asks this Court to double that daily penalty for the recorded statement to $200 per day for the period it was withheld from both of her requests. She is also requesting an additional $100 per day for each of the two other records. This amounts to a request for $400 per day for many of the days in Plaintiff's requested penalty calculation.

This Court should instead analyze and apply the *Yousoufian* aggravating and mitigating factors and determine a reasonable single daily penalty within the statutory penalty range. We are asking this Court to impose a daily penalty between zero and $30 per day based on the facts of this case. Again, DSHS has never claimed that the three records were exempt from disclosure to Plaintiff. The recorded statement was provided as soon as DSHS discovered it was not originally provided, which was months before this lawsuit was filed. The two other records were provided in discovery in her torts case, and DSHS did not identify them as responsive to the requests for public records. This conduct does not amount to bad faith, and a daily penalty should be at the low end of the penalty range and is nowhere near the daily $100 maximum penalty.

With regard to attorney fees, Plaintiff is requesting 378.6 hours for four attorneys and 48.25 hours for a paralegal, and they want up to $500 per hour for the attorney work. Plaintiff's petition fails to provide an accounting for a single hour of the work performed. This Court's decisions on PRA liability in this case involved a summary judgment hearing on April 29, 2011, and less than a day and a half of trial that started on August 31, 2011. Claiming 426.85 hours for "reasonable" fees in this case is extremely excessive, and even more outrageous is the request in Plaintiff's petition to double their attorney fees with a Lodestar multiplier to $332,500 in fees.

This Court should deny Plaintiff's request for attorney fees because she failed to account for her 426.85 hours in fees. DSHS is entitled to an opportunity to review and respond

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

to an accounting so that the Court can then conduct a Lodestar analysis to determine reasonable attorney fees.

II. STATEMENT OF FACTS

Plaintiff, through her attorneys, made written requests for records on March 26, 2007, and on May 20, 2008.

Plaintiff filed this lawsuit on April 6, 2010, claiming violations of the Public Records Act (PRA). A trial lasting a day and a half took place on August 31, 2011. This Court ruled that DSHS violated the PRA by withholding the following three records:

1. An audio recording and transcript (hereafter "audio recording") provided on December 11, 2009.
2. A DSHS foster care/adoption manual (hereafter "PRIDE manual") provided on March 4, 2010.
3. The Child Physical and Sexual Abuse Investigation Protocols for Pierce County, Washington (hereafter "Investigation Protocols") provided on March 16, 2010.

This Court also ruled that DSHS violated the PRA by not listing these "withheld" records on an exemption log. *See* Findings of Fact and Conclusion of Law. As discussed in detail in the argument below, only one record, an audio recording, was inadvertently missed when producing approximately 5,600 pages to Plaintiff from her DSHS child welfare file. When the error was discovered, this missed record was promptly produced on December 11, 2009. *See* Trial Exhibit 215. The PRIDE Manual and Investigation Protocols documents were produced in discovery in Plaintiff's tort lawsuit in federal court and were never produced in response to her public record requests. *See* Trial Exhibits 5 and 6.

This Court did not find any other violations of the PRA with regard to the other roughly 5,600 pages of records that were produced in response to Plaintiff's requests for records. This Court declined the request by DSHS to treat the audio recording from Plaintiff's child welfare

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

file as being governed exclusively by RCW 13.50.100 instead of the PRA. This Court did not explain why the audio recording is not governed by RCW 13.50.100, and DSHS renews its request to apply no penalty to this record under the substantial authority provided in summary judgment argument and in Defendant's trial brief.

All three records in question were provided to Plaintiff prior to this case being filed, and this lawsuit has not caused a single withheld record to be produced to Plaintiff. Yet, Plaintiff now seeks the incredible sum of $636,396.87 in penalties, attorney fees, and costs.

III. STATEMENT OF ISSUES

1. Instead of defaulting to the $100 per day maximum penalty, should this Court also consider mitigating factors and apply a penalty that is more appropriately in the zero to $15 per day range?

2. Should this Court deny Plaintiff's request for attorney fees and costs, which include 426.85 hours of legal work for four attorneys at up to $500 per hour, when Plaintiff has failed to provide adequate information for this Court to conduct an independent determination of fees and costs using the Lodestar method?

IV. ARGUMENT

A. Instead Of Defaulting To The Maximum Penalty Of $100 Per Day For Each Of The Three Records, This Court Should Consider Mitigating Factors And Apply A Penalty Of Zero To $15 Dollars Per Day To Two Categories Of Records

1. The General PRA Penalty Scheme

The penalty provision in the PRA is in RCW 42.56.550(4), which provides that in addition to being awarded costs and attorney fees, "it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record."

The process for determining the appropriate PRA award is best described as requiring two steps: (1) determine the amount of days the party was denied access and (2) determine the appropriate per day penalty within the penalty range depending on the agency's actions. *See Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 438, 98 P.3d 463 (2004) (*Yousoufian I*). A per-record penalty is not required, and penalties can be determined on a per-request basis.

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

Zink v. City of Mesa 140 Wn. App. 328, 348, 166 P.3d 738 (2007) (trial court directed to impose statutory penalties on a per-day, per-request basis).

2. Number Of Records – Applying A Separate Daily Penalty To Each Separate Record Withheld Is Not Required Under The PRA

In *Yousoufian I*, the Washington Supreme Court held that trial courts are not required to award a daily penalty for each record that was requested but not produced. *Yousoufian I*, 152 Wn.2d at 435-36. In that case, the county argued that a "per record" penalty would lead to absurd results. *Id.* at 431. Specifically, it sensibly asserted—and the court agreed—that "[u]nder Yousoufian's interpretation, agencies that acted in good faith but failed to respond adequately to broad requests for multiple documents would often pay higher penalties than agencies that refused to disclose a single document in bad faith." *Id.* at 435. That court held:

> **Although the PDAs purpose is to promote access to public records, this purpose is better served by increasing the penalty based on an agency's culpability than it is by basing the penalty on the size of the plaintiffs [sic] request.** . . . Therefore, based on the ambiguity of the statute and the purpose for enacting the [PRA], we conclude that RCW [42.56.550(4)] does not require the assessment of per day penalties for each requested record.

Id. at 435-436 (footnotes omitted) (emphasis added). We are not aware of any Washington appellate court that has ever approved a strict "per record" penalty. The Washington Supreme Court more recently again applied the reasoning in *Yousoufian I* and confirmed a per-record penalty is not required. *Sanders v. State*, 169 Wn.2d 827, 864, 240 P.3d 120 (2010). The court explained "the trial court interpreted the PRA request as seeking two records, **as grouped broadly by subject matter**. This is consistent with the discretion we elucidated in *Yousoufian I*." *Id.* at 864 (emphasis added). With regard to four documents that were improperly withheld in that case, the court explained:

> These four wrongfully withheld documents all relate to the same topic, screening procedures at AGO during Justice Sanders's CJC proceeding, and **were produced at roughly the same time**. Consistent with our affirmance of the trial court's grouping of the other documents in this case, we consider these four documents a single "record."

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

Id. at 864-865 (emphasis added).

This Court found that three records were improperly withheld under the PRA. The first record is the audio recording, and Plaintiff is asking this Court to apply two $100 per day penalties to this record because the record is responsive to both the 2007 and 2008 requests. There is no legal authority to apply two separate penalties to one record that was withheld from a single plaintiff. This Court must apply a single penalty to the audio recording. To hold otherwise will lead to absurd results such as requesters asking for the same records multiple times to gain larger penalties.

Plaintiff is seeking a separate penalty for the PRIDE Manual and Investigation Protocols document in relation to her May 20, 2008 request for records. Following the trial in this case, this Court did not explain what language in Plaintiff's request specifically asked for the PRIDE Manual and Investigation Protocols documents. However, the Court did indicate during the trial that it believed these documents were responsive to the requests under a broad "discovery" standard that entitles a person to all documents that could relate to their potential claims against an agency. Both of these records were provided to Plaintiff in March 2010 in the discovery phase of her torts case in federal court. *See* Trial Exs. 5 and 6. Pursuant to *Yousoufian I* and *Sanders*, the PRIDE Manual and Investigation Protocols documents should be treated as one "record" because they are both within the same broad group and produced at roughly the same time.

3. Number Of Penalty Days – This Court Must Calculate The Actual Number Of Days Plaintiff Was Denied The Right To Inspect Or Copy The Records

The determination of the number of penalty days is a question of fact. *Yousoufian I*, 152 Wn.2d at 439. PRA penalties are awarded "for each day that [the plaintiff] was denied the right to inspect or copy said public record." *Id* at 437. The date Plaintiff received the three records is not in dispute. However, Plaintiff asks this Court to start the penalty period from the date of the record requests, which is incorrect.

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

Nothing in the penalty provision in RCW 42.56.550(4) requires the penalty period to begin on the day of the request; the Court must instead determine the number of days Plaintiff was denied the records. Under RCW 42.56.520, an agency must respond to a public records request within five days and is permitted to respond by confirming it "has received the request and providing a reasonable estimate of the time the agency . . . will require to respond to the request." Also, "[a]dditional time required to respond to a request may be based upon the need to clarify the intent of the request" and "to locate and assemble the information requested." RCW 42.56.550. Thus, the penalty period in this case should begin when the three withheld records properly should have been provided to Plaintiff, which is when DSHS estimated it would complete the response or actually timely completed the response.

With regard to the request on March 26, 2007, DSHS timely responded to attorney Carter Hick by seeking clarification of what records were being requested and securing a signed authorization. *See* Trial Exs. 201, 202, 203. On May 8, 2007, DSHS estimated the records would be provided within 30 days, and the records were timely provided on June 1, 2007. *See* Trial Exs. 205 and 206. This response time did not violate the PRA. *See* Findings of Fact and Conclusions of Law. The missed audio recording was provided on December 11, 2009, and has a penalty period of 924 days from June 1, 2007.

With regard to the request on May 20, 2008, DSHS timely responded on May 28, 2008, estimating the response would take up to 120 business days, and DSHS complied with that estimate by providing the final installment of records on November 14, 2008. *See* Trial Exs. 206, 207, 211, 212, 213, and 214. This response time did not violate the PRA. *See* Findings of Fact and Conclusions of Law. DSHS provided the PRIDE Manual and Investigation Protocols documents in discovery in the torts lawsuit on March 4, 2010, and March 16, 2010, respectively. Therefore, the correct penalty days are 475 days for the PRIDE Manual and 487 days for the Investigation Protocols document. Because these two documents should be treated

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

as one "record" for penalty assessment, the longer period of 487 days should be used for this category of records.[1]

4. Daily Penalty – The Daily Penalty For The Records Withheld Should Be At The Very Low End Of The Penalty Range Based On The *Yousoufian* Factors

The determination of the appropriate per day penalty is within the discretion of the trial court. *Yousoufian,* 152 Wn.2d at 439. Trial courts may exercise their considerable discretion under the PRA's penalty provisions in deciding where to begin a penalty determination. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 466-467, 229 P.3d 735 (2010). "[D]epending upon the circumstances of a case, it may be within a trial court's discretion to begin a penalty determination at the minimum daily penalty amount of $5." *Yousoufian*, 168 Wn.2d at 467 n.9.

Effective July 22, 2011, RCW 42.56.550(4) was modified to eliminate the five-dollars-per-day minimum penalty for PRA violations and provide courts with discretion to award less than five dollars per day or no penalty at all. *See* Laws of 2011, ch. 273, § 1. By definition, this amendment is remedial in nature, as it revises the remedy a court may award for certain violations of the PRA and does not affect a substantive or vested right. *1000 Virginia v. Vertecs,* 158 Wn.2d 566, 586, 146 P.3d 423 (2006); *Marine Power & Equip. v. Human Rights Comm'n*, 39 Wn. App. 609, 617, 694 P.2d 697 (1985).

A remedial statute applies retroactively. *Ballard Square Ass'n Condo. Owners v. Dynasty Constr.*, 158 Wn.2d 603, 617, 146 P.3d 914 (2006). Retroactive application is appropriate even after a lawsuit is filed and the case is on appeal. When a controlling law changes between the entering of judgment below and consideration of the matter on appeal, the appellate court should apply the new or altered law. *Marine Power*, 39 Wn. App. at 620; *see also West v. Thurston Cnty.*, 144 Wn. App. 573, 583-84, 183 P.3d 346 (2008) (applying

[1] Defendant's proposed penalty calculations are summarized in Appendix A to this response.

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

amendment to PRA enacted while case was on appeal, i.e., PRA's applicability to public funds expended by private legal counsel).

The Washington Supreme Court has set forth sixteen mitigating and aggravating factors that a trial court may consider when determining a daily PRA penalty. *Yousoufian*, 168 Wn.2d at 467-68. A strict and singular emphasis on good faith or bad faith is inadequate to fully consider a PRA penalty determination. *Id.* at 461. "[T]he factors may overlap, are offered only as guidance, may not apply equally or at all in every case, and are not an exclusive list of appropriate considerations." *Id.* at 468. Plaintiff wrongly claims "DSHS failed to offer **any** evidence showing that the "mitigating" factors described in *Yousoufian* apply." Pls. Pet. at 8 (emphasis in original). Their position ignores much of the undisputed evidence at trial and the following *Yousoufian* guidance:

> In our view, mitigating factors that may serve to decrease the penalty are (1) a lack of clarity in the PRA request, (2) the agency's prompt response or legitimate follow-up inquiry for clarification, (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions, (4) proper training and supervision of the agency's personnel, (5) the reasonableness of any explanation for noncompliance by the agency, (6) the helpfulness of the agency to the requestor, and (7) the existence of agency systems to track and retrieve public records.

Yousoufian, 168 Wn.2d at 467. Accordingly, consideration of the following relevant Yousoufian factors strongly favors a low daily penalty award:

Lack of Clarity in the Request: The 2008 request did not expressly request the PRIDE Manual or the Investigation Protocols document, and it did not clearly identify a class of records that includes these two documents. *See* Trial Exhibit 206. This should reduce the penalty related to those documents.

Prompt Initial Response: It is undisputed that DSHS timely responded within five days to both the 2007 and 2008 requests for records, helpfully acknowledged the requests and provided an estimate of time for responding, and then provided their responses within the time

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

estimates. *See* Trial Exhibits 202, 204, 207, 210-214. Because DSHS met its duty under RCW 42.56.520 to provide a prompt initial response, the daily penalty award should be mitigated.

Good Faith, Honest Processing of the Request and Strict Compliance with PRA: All of the communications from DSHS to the requester in this case demonstrate good faith, courtesy, professionalism, and an effort to be helpful and properly fulfill the requests for records. *See* Trial Exs. 202, 204, 205, 207, 210-215. DSHS timely responded to every concern raised by the requester, and explained in detail how the requests for records were being processed. DSHS complied with the five day response requirement and produced records with the estimated times. DSHS also properly made redactions and claimed exemption in the roughly 3,400 pages of child welfare records.

When DSHS processed Amber Wright's child welfare file consisting of thousands of pages of records, this Court found that only one record was missed from the enormous file. Upon learning about that missed audio recording in early December 2009, DSHS promptly provided it on December 11, 2009. McPherson Declaration In Support of Department's Response (McPherson Decl.) ¶ 8, Ex. D.

There was not an attempt to hide the existence of the interview. Rather, there were multiple pages in the first installment of records provided to the requester that made mention of the recorded interview, including a form called Children's Administration Audio Recording Tracking, which is a standard form used for audio-recorded child interviews. McPherson Decl. ¶ 10. Also, the requester herself, Amber Wright, would know at every stage that she had given a recorded interview. The goal of DSHS is to provide all responsive records, and their disclosure staff understands that in a case such as this one, a separate tort lawsuit will often involve civil discovery requests for the very same records. McPherson Decl. ¶ 11. Thus, purposely withholding the recorded interview in this case and then later producing it would not only violate DSHS disclosure policies, it would be irrational. While a disappeared or

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

destroyed audio recording might raise some questions, this recording was quickly found and provided upon discovering the inadvertent error.

The PRIDE Manual and Investigation Protocols documents also involve good faith. DSHS did not find language in the 2008 request that could reasonably be viewed as asking for these two documents. *See* McPherson Decl. ¶ 18. These two documents are not records in Amber Wright's child welfare files, and they do not relate specifically to Amber Wright. McPherson Decl. ¶ 19. These two documents were never provided as part of the DSHS public records response, and they were only provided to Plaintiff in response to discovery requests seeking these records in her torts lawsuit in federal court. *See* McPherson Decl. ¶¶ 14-17; Trial Exhibits 5 and 6. Plaintiff's petition tries to couch this as an "obstruction of justice," but her petition remarkably fails to quote any language in her lengthy 2008 request that even identifies these documents as being requested.

DSHS currently employs approximately 16,000 staff, serves over two million clients in need annually, and can receive over 24,000 separate records requests per year. Wiitala Declaration in Response to Petition (Wiitala Decl.) ¶ 3, 4. DSHS has experienced staff involved in public records disclosure throughout the agency and, despite the pressures of workload and the large number of requests, DSHS public records staff are dedicated professionals who are committed to the principles of open government and work hard to ensure available records are located and disclosed. Wiitala Decl. ¶ 13.

DSHS public records staff understand that clients have a right to their own records and they strive to do their best to produce records to the best of their abilities. Wiitala Decl. ¶ 13. Although an occasional error can occur, primarily due to overwhelming workload and time constraints, the DSHS Public Records Officer, in her ten and a half years in that role, is not aware of any employee involved in disclosing records who has deliberately or willfully failed to produce records. Wiitala Decl. ¶ 14.

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

Although more than 24,000 requests for records can be received in a year, DSHS has experienced only an average of seven public record lawsuits per year from 2006 through 2010, and only a few of these roughly 35 lawsuits have resulted in a judicial determination of penalties and attorney fees. Wiitala Decl. ¶ 15. Excluding the accepted offer of judgment in the *Tamas* case that Plaintiff has repeatedly asked this Court to give weight to, the average settlement or judgment has been about $12,000. Wiitala Decl. ¶ 15.

The very strong record of good faith conduct in this case and across the DSHS public records program merits a very low penalty.

Training and Supervision of Employees: DSHS has a history of very strong public records training and supervision, which is discussed in detail in the attached Declaration of Kristal Wiitala, who is the DSHS Public Records Officer and is one of the top public record experts in the this state. *See* Wiitala Decl. ¶¶ 6-13, 16. Plaintiff's first request was March 26, 2007, and as of July 2007, 95 percent of all DSHS staff, or 17,916 employees, had received public records training, and Children's Administration last reported that 93 percent of its employees had received basic public records training. Wiitala Decl. ¶ 6.

Under DSHS policy, each local office, facility, or region designate public disclosure officers, currently about 200 people, and each administration and division appoints a Public Disclosure Coordinator to serve as the lead expert for that area to assure that public records requests are properly routed and fulfilled in the field. Wiitala Decl. ¶ 7. All of these staff receive several types of advanced public records training. Wiitala Decl. ¶ 7. New Public Disclosure Coordinators receive training on how to route, coordinate, and manage records requests within the DSHS structure, to work with Public Disclosure Officers serving in their local offices or regions, and to be available to answer questions by staff having to search for or produce records. Wiitala Decl. ¶ 7.

The DSHS Public Records Officer convenes a meeting at least every other month with the approximately 30 Public Disclosure Coordinators where they discuss new court decisions

or legislative changes, emergent issues, procedures, and best practices. Wiitala Decl. ¶ 10. When the State Auditor's Office completed its Public Records Performance Audit in 2008, DSHS was recognized as a top performer in the various criteria reviewed in the Audit and already had in place most of the best practices recognized in that program review. Wiitala Decl. ¶ 16.

Therefore, the agency is well-trained and supervised on public records, which favors significant mitigation of the penalty.

Routing and Tracking of Requests and Documents: At the time of Plaintiff's requests, Children's Administration had a record request tracking process that utilized spreadsheets to track requests. *See* Wiitala Decl. ¶ 11. DSHS consistently has projects devoted to reviewing records disclosure processes and recommending continuing improvements, best practices, and enhancements. Wiitala Decl. ¶ 11. A recent project led to the adoption in 2010 of an agency-wide tracking system that is now used to coordinate, assign, track, and monitor records requests across all of DSHS. Wiitala Decl. ¶ 11. Thus, DSHS' system for routing and tracking of requests is yet another mitigating factor that should favor low penalties in this case.

Reasonable explanation for noncompliance: As detailed above, the explanations by DSHS are reasonable and reflect no bad faith. The audio recording was the only record missed in Plaintiff's seven volume 3,400 page child welfare file, its existence was disclosed, and the recording was provided promptly upon discovering the mistake. Recorded interviews are often transcribed, and DSHS believes the person copying the file may have thought a paper transcript of the audio recording was among the 3,400 pages of records initially provided. McPherson Decl. ¶ 9. The other two documents were provided in discovery in the torts case and were simply never identified by DSHS as documents requested by Plaintiff in her requests. The Department's reasonable explanations for not initially providing these three documents should mitigate the penalty.

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

Potential for public harm or individual economic loss: Ms. Wright has not alleged any public harm or economic loss related to the disclosure of these three records. She is seeking a large sum of money in her tort lawsuit against DSHS, but that trial is not scheduled to start until May 29, 2012. *See Wright v. Dep't of Social and Health Servs.*, Pierce County Superior Court No. 09-2-06018-1. Thus, she has possessed these three records more than two years in advance of her torts trial. This should also mitigate and favor a very low daily penalty.

Size of the agency and deterrence of future misconduct: It is important to recognize that the large size of DSHS does not translate into a cushion in its budget to pay a large penalty. The DSHS budget is committed for client services, benefits, and other mandated functions DSHS performs, and any award of any amount adversely affects these programs. Wiitala Decl. ¶ 5.

DSHS' budget has been under continuing pressures to reduce expenditures and staff because of state revenue reductions, budget cuts, and caseload increases, resulting in continuing cuts in number of employees, programs, services and resources. Wiitala Decl. ¶ 5. An upcoming legislative special session will certainly reduce DSHS funding even further so that the State of Washington can resolve an estimated two billion dollar biennium shortfall, and agencies have recently been warned to prepare for up to ten percent cuts in funding. Wiitala Decl. ¶ 5.

There are no budget dollars set aside in DSHS to pay public records penalties, and when a public records judgment is entered against the Children's Administration, the judgment is paid directly out of the program's operating budget, thus further reducing the ability of programs to serve their clients. Wiitala Decl. ¶ 5. When lawsuits arise, DSHS takes them very seriously and reviews the systems and procedures in place to mitigate any future similar errors or risks. Wiitala Decl. ¶ 14. Thus, a large penalty is not necessary or appropriate to deter future errors.

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

Plaintiff's petition failed to point to any specific facts to support a high penalty. Plaintiff simply alleges the "violations of law were egregious," but she falls short on pointing to any evidence that the records were withheld intentionally or in bad faith. Pls. Pet. at 8. Plaintiff's also purposely avoids informing this Court where the penalty ranges have been in other cases because those cases favor a low penalty in this case.

"In determining an appropriate penalty, [courts] look to previous awards for guidance[.]" *American Civil Liberties Union of Washington v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 114, 975 P.2d 536 (1999) (*ACLU*). In *ACLU*, the appellate court determined that a school district acted in bad faith because they sent thousands of pages instead of the thirteen pages requested, they denied records because they did not want to take additional staff time to make copies, and they did not want to spend time assisting the ACLU with trial preparation. *See ACLU*, 95 Wn. App. at 113. With such a clear finding of bad faith, the *Blaine* court concluded that a penalty of more than $5 per day was necessary, and $10 per day for 577 days was an appropriate penalty. *See id.* at 114. A low penalty is appropriate for good faith errors that occur:

> The minimum statutory penalty should be reserved for instances of less egregious agency conduct, such as those instances in which the **agency has acted in good faith but, through an understandable** misinterpretation of the PDA or **failure to locate records**, has failed to respond adequately.

Yousoufian v. Office of Ron Sims, 114 Wn. App. 836, 854, 60 P.3d 667 (2003), *Aff'd in part, Rev'd in part on other grounds*, 152 Wn.2d 421, 98 P.3d 463 (2004) (emphasis added). *Yousoufian* involved the trial court concluding that "the County was negligent in the way it responded to Mr. Yousoufian's [PRA] request at every step of the way, and this negligence amounted to a lack of good faith." *Yousoufian*, 168 Wn.2d at 456. Our supreme court ultimately applied the sixteen factors and set the penalty at $45 per day. *Id.* at 469.

In a more recent case with facts closer to the present case, the Washington Supreme Court approved an $8 per day per record category penalty against an agency for wrongful

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

withholding, which consisted of a $5 per diem penalty for the wrongful withholding itself, plus a $3 per diem aggravator for failure to provide a brief explanation of its claimed exemptions. *Sanders,* 169 Wn.2d at 859.

Our present case involves facts nowhere near the negligent conduct that led to a $45 per day penalty in *Yousoufian*, and is instead similar to the facts leading to an $8 penalty in *Sanders*. Plaintiff did not present any evidence that the "withholding" of the three documents was intentional, and her petition points to no such evidence. We respectfully ask this Court to impose penalties in the zero to $15 per day range.

5. Even If Plaintiff Is Entitled To A Daily Penalty For The Audio Recording, She Is Not Entitled To An Increase In Penalties For The Transcription Of The Audio Recording That Was Created More Than A Year After Her Public Record Requests Were Made

It is undisputed that the audio recording was transcribed in December 2009, when the Department discovered the recording was not previously provided to Plaintiff. McPherson Decl. ¶ 8, Ex. D. Thus, the transcription itself is not a separate responsive record that was withheld.

When the Department transcribed the audio recording in December 2009 and provided the transcription along with a copy of the audio recording, the transcription was provided as a courtesy, not as a requirement under the PRA. Plaintiff is not entitled to a separate daily penalty for the written transcription of the interview, which did not even exist at the time of her 2007 or 2008 requests. The PRA does not require an agency to create a record that does not exist at the time of the request. *See Citizens For Fair Share v. State Dep't of Corrs.* 117 Wn. App. 411, 435, 72 P.3d 206 (2003), review denied, 150 Wn.2d 1037 (2004) ("the law does not require creation of non-existent records in response to a public records disclosure request").

Therefore, Plaintiff's request for any additional daily penalties related to the written transcript should be denied, and only the audio record can be considered for a daily penalty.

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

6. Plaintiff Is Not Entitled To Any Increase In Penalties Related To DSHS Failing To Provide A Privilege Log Listing The Three "Withheld" Documents

No decision has ever held that a document that is inadvertently missed in a record production or a document that was not identified as being responsive must be put on an exemption log. In a public records request like Plaintiff's, DSHS does not list these three records on an exemption log. McPherson Decl. ¶ 22. Exemption logs are utilized to inform the requester of responsive documents that are not being provided because they are exempt from disclosure. McPherson Decl. ¶ 22. Amber Wright's recorded interview was not exempt from disclosure. McPherson Decl. ¶ 22. Rather, it was inadvertently missed in the production of documents, and it was provided without redaction upon discovering the mistake. McPherson Decl. ¶ 22. DSHS never identified the audio recording as being exempt from disclosure. McPherson Decl. ¶ 22. The Investigation Protocols document and PRIDE manual were never identified as responsive documents. McPherson Decl. ¶ 22. If they had been identified as responsive, they would have been disclosed as non-exempt instead of being listed on an exemption log. McPherson Decl. ¶ 22.

Although it would be an absurd result, even if such records did need to be on an exemption log, the violation should only aggravate the penalty by $3 per day. *Sanders*, 169 Wn.2d at 860-861.

B. Plaintiff's Request for Attorney Fees and Costs Should be Denied Because Plaintiff Failed to Provide Adequate Information for This Court to Use the Lodestar Method to Make an Independent Determination of Attorney Fees and Costs

1. Plaintiff's Claimed Attorney Fees Are Excessive And Lack Sufficient Detail For An Independent Lodestar Determination By This Court

Plaintiff has submitted a request for 426.85 hours of legal time for a team of four lawyers charging up to $500 per hour and a list of lump-sum costs totaling $16,096.87. The complete lack of detail and support for these charges make it impossible for this Court to conduct a Lodestar analysis.

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

In a PRA case, the trial court must make an independent determination of a reasonable fee, and the determination of a reasonable fee begins with the calculation of a Lodestar figure. *ACLU*, 95 Wn. App. at 117 (citing *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983)). *See also Sanders*, 169 Wn.2d at 869 (Lodestar method is appropriate for calculating attorney fees under the PRA). A Lodestar figure is determined as follows:

> The trial court must determine the number of hours reasonably expended in the litigation. ... The court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. (citation omitted) A trial court may reduce the requested fee if it finds that the hours billed are excessive or unnecessary.

ACLU, 95 Wn. App. at 118 (emphasis added). *See also Yousoufian*, 114 Wn. App. at 856 (Lodestar determination requires determining hours reasonably expended on "the litigation" and discounting unsuccessful claims and unproductive time). In *ACLU*, this state's Supreme Court affirmed that $5,500.00 was a reasonable attorney fee for the plaintiff's attorney taking the public records case through a trial. *See ACLU*, 95 Wn. App. at 120. A court using the Lodestar method multiplies a reasonable attorney rate for the prevailing party by a reasonable number of hours worked. *Sanders*, 169 Wn.2d at 869.

The party seeking attorneys' fees bears the burden of proving the reasonableness of the fees. *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632 (1998). To arrive at the Lodestar elements of reasonable hours and reasonable rate, the trial court must evaluate the appropriate factors in the context of each case. *Boeing v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). A court should consider attorney billing information, but those figures alone are not determinative of a reasonable number of hours or reasonable rate in a particular case. *Bowers*, 100 Wn.2d at 597; *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). In this case, Plaintiff has failed to provide billing information other than the claimed grand total for each of the four Plaintiff attorneys.

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

The reasonableness of the fees must be determined independently by the court, and the court should take an active role in analyzing attorney fee awards. *Absher Constr. Co. v. Kent Sch. Dist.*, 79 Wn. App. 841, 846, 917 P.2d 1086 (1995), *citing*, *Nordstrom*, 107 Wn.2d at 744. When Courts take an active role in analyzing attorney fee awards, attorney fee affidavits submitted by counsel should not be accepted unquestionably. *See Mahler*, 135 Wn.2d at 434, *citing Nordstrom*, 107 Wn.2d at 744.

The trial court may supplement its Lodestar determination using the factors listed in former RPC 1.5(a), and one such factor is "[t]he fee customarily charged in the locality for similar legal services." *See Mahler*, 135 Wn.2d at 433 n.20. Plaintiff presents no evidence that the prevailing market rate in the Puget Sound region for legal services for a PRA case is $500 per hour. This Court should follow the decision by Division One of the Court of Appeals of Washington, which held that $300 per hour was an unreasonable hourly fee for a lawsuit brought under the Public Records Act, RCW 42.56.001, *et. seq.*, even when the plaintiff was represented by former Washington State Supreme Court Justice Philip Talmadge. *West v. Port of Olympia*, 146 Wn. App. 108, 123, 192 P.3d 926 (2008). The court stated, "[a]lthough Philip Talmadge can bill $300 per hour for work that requires his special expertise, that rate is unreasonable in a case of this type," instead, establishing that $250 per hour was the reasonable hourly rate for services provided in that case. *Id.*

In addition, DSHS recently received a motion for attorney fees and costs in another public records lawsuit, *Witt v. DSHS*, and the attorney in that case with over twenty years of experience, including appellate practice[2] on public records issues, is charging an hourly rate of $250 per hour. Wiitala Decl. ¶17, Ex. A. By way of comparison, that case has involved more than three years of litigation, discovery, hearings on four motions, mediation, and a one day trial with live witnesses. Wiitala Decl. ¶17. The attached motion and supporting attorney fee

[2] The attorney in *Witt v. DSHS* was the attorney of record in the case *In re Dependency of KB*, 150 Wn. App. 912, 210 P.3d 330 (2009), which was one of the central PRA reported decisions argued throughout this present case.

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

summary filed in that case seeks a total of $15,821.25 in fees and costs. Wiitala Decl. ¶17, Ex. A. That case was more complex than the present case and included issues with injunctions and hundreds of pages of contested redactions. Wiitala Decl. ¶17.

The attorney fee applied in this present case should be $250 per hour, which is in perfect agreement with *West v. Port of Olympia*, and the *Witt v. DSHS* case that is more complex than this case. The issues in this case were not particularly complex. Plaintiff had one witness and eleven exhibits at trial, and the trial issues did not merit the filing of a trial brief or motion in limine from Plaintiff. There was a summary judgment hearing on April 29, 2011, and a day and a half trial that started on August 31, 2011.

To determine the number of hours reasonably spent in litigation, the court may rely upon the attorney's documentation of the work performed. *Bowers,* 100 Wn.2d at 597. Plaintiff has failed to provide the following documentation required by the *Bowers* case:

> To this end, the attorneys must provide reasonable documentation of the work performed. This documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (*i.e.,* senior partner, associate, etc.).

Id. When such documentation is provided, the court has an independent obligation to look beyond the hours the attorney spent or could bill the client. *Nordstrom,* 107 Wn.2d at 744. In other words, the amount of time "actually spent by the plaintiff's attorney may be relevant but it is in no way dispositive." *Id.* Hours that are not reasonably expended are not compensable. *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S. Ct. 1933 (1983). Unreasonable hours include those spent on duplicated effort, unnecessary preparation or otherwise unproductive time. *Mahler,* 135 Wn.2d at 434; *Bowers* 100 Wn.2d at 597, 600.

Plaintiff has failed her burden to prove that the 426.85 hours of legal time spent were reasonably spent on this litigation. Plaintiff also has failed to justify why a team of four lawyers was needed for this case. A Trial Court should look hard at situations where multiple attorneys

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

are engaged in essentially the same task.

> While certain complex litigation may require the combined effort by counsel, this factually limited excessive force case, with well-established legal standards, is not one which requires joint effort of specific tasks. The court's criticism in this respect is not directed to the use of two attorneys to litigate the matter. Having made that decision, however, counsel are not free to charge twice for essentially the same work performed outside the hearing and trial context....These records reflect that counsel undertook to bill twice for essentially the same task, one direct (the actual research, drafting, or preparation) and one indirect (telling co-counsel or 'discussing' what one has learned or done.) This practice is reflective of the unreasonableness of counsel's fee request.

Heavener v. Myers, 158 F. Supp. 2d 1278, 1282 (E.D. OK 2001). *See alsoForshee v. Waterloo Indus., Inc.* 178 F.3d 527, 532 (8th Cir. 1999) (court reasonably reduced hours claimed for duplicative efforts). It is also appropriate for a court to apply a percentage reduction to fees in a PRA case based on "overall excessiveness of the amount of fees expended, and the fact that the majority of the fees were incurred after the disclosure had been made." *See Yousoufian*, 114 Wn. App. at 856-57, *aff'd in part, rev'd in part on other grounds*, 152 Wn.2d 421 (2004). Here, all the fees in this litigation were incurred after disclosure of the three documents in question.

A court has the discretion to apportion an award of costs and fees so that it does not relate to any exempt documents. *See Limstrom v. Ladenburg*, 136 Wn.2d 595, 616, 963 P.2d 869 (1998) (requiring that an award "relate only to that which is disclosed and not to any portion of the requested documents found to be exempt"). In the present case, the three records at issue did not reasonably require over 400 hours or legal time to determine whether there was a PRA violation related to those records. The Department never disputed when each of the three records were provided to Plaintiff's counsel. The Department never disputed that the recorded interview was a responsive record; the dispute was whether the recorded interview was governed by RCW 13.50.100 or the PRA. With regard to the other two documents, there was no dispute that they were provided to Plaintiff through discovery responses in her torts

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

litigation. Rather, the dispute on those two documents was whether or not they were actually requested and identified in Plaintiff's public record requests.

Other than the trial, very little time in this case was actually spent focusing on the three documents that this Court determined were improperly withheld. Defendant has no idea how Plaintiff can attribute 426.85 hours of legal work to prevailing on those three documents. Thus, Defendant cannot make an informed and meaningful recommendation for a reduction without seeing what the hundreds of hours are claimed are actually comprised of.

This Court should deny Plaintiff's request for attorney fees. If the Court is going to award fees, it should award a fee of $25,000. Such fee is comprised of a reasonable estimate of 100 hours of work for one attorney at $250 per hour.

2. Plaintiff's Request For A 2.0 Lodestar Multiplier Should Be Denied

With over thirty years of reported public record decisions, we are not aware of any PRA lawsuit or decision that has ever approved a Lodestar multiplier for an attorney fee award, and Plaintiff provides no such authority. The primary case relied on by Plaintiff for a contingency fee Lodestar multiplier is *Hudson Co., Inc. v. Ryffel* 2009 WL 2601983 (Wn. App. Div. 2, 2009). *Hudson* is an unpublished decision, has no precedential value, and cannot be cited as authority by Plaintiff. *See* GR 14.1; RCW 2.06.040.

In rare cases, a Lodestar fee calculation can be adjusted upward or downward. *Mahler*, 135 Wn.2d at 434. However, such adjustments are indeed "rare." *See Sanders*, 169 Wn.2d at 869. In *Sanders*, the Washington Supreme Court affirmed the trial court's refusal to grant Justice Sanders his requested 1.5 Lodestar multiplier in a PRA case. *Id.* "It was not an abuse of discretion for the trial court to refuse to give Justice Sanders the benefit of the exception when the rate times hours product already greatly exceeded the contingency fee for the case." *Id.*

The exact same situation applies in this case. Plaintiff is seeking an inflated penalty calculation of $287,800. Plaintiff does not provide evidence of what her contingency fee is.

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

However, her request for attorney fees of $332,500 would be a contingency fee of 115 per cent, which is the epitome of an unreasonable attorney fee.

Plaintiff tries to describe this as a high risk case. Yet, it is a fact that she had already received the three documents found to be withheld before she filed this lawsuit. Also, the case is not significantly risky when the PRA has a powerful strict liability penalty and attorney fee provision under RCW 42.56.550(4) that allows for a recovery of reasonable attorney fees. A multiplier is inappropriate in this case and will invite increased public records litigation from attorneys hoping to have a chance at Plaintiff's requested $1,000 per hour for legal fees. Plaintiff's request for a Lodestar multiplier should be denied.

3. Plaintiff's Undocumented Litigation Costs Are Excessive And Lack Sufficient Detail For An Independent Lodestar Analysis By This Court

Plaintiff has made an inadequate showing to support her requested $16,096.87 in costs, and DSHS disputes the following costs:

Court Reporter	$1,400.00
Depositions	$1,906.18
Outside Photocopies	$2,735.39
Expert Fees	$6,360.00
In-House Print Jobs	$1,203.50

For all five of these categories, Plaintiff has failed to itemize any of these totals, much less show how they were reasonably necessary for this litigation. The depositions involved very minimal discussion about the three documents that were determined to be improperly withheld. Plaintiff did not use the depositions at trial. The photocopy charges, both inside and outside, are excessive and unsupported. Plaintiff only had eleven small exhibits at trial. These costs should be reduced by at least 50 per cent.

Plaintiff's request for $6,360.00 in expert fees should be denied. An expert's opinion is admissible if the witness is properly qualified, relies on generally accepted theories, and the expert's testimony is helpful to the trier of fact, construing "helpfulness" broadly. *Philippides v. Bernard*, 151 Wn.2d 376, 88 P.3d 939 (2004). Generally, expert evidence is

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

helpful and appropriate when the testimony concerns matters beyond the common knowledge of the average layperson. *Carlton v. Vancouver Care, LLC,* 155 Wn. App. 151, 231 P.3d 1241 (2010). The testimony of Plaintiff's alleged expert was not qualified by the court, was lay testimony rather than expert opinion, and cannot fairly be characterized as "expert" testimony. Expert fees are not warranted when the testimony provided is actually lay testimony.

Also, costs have generally been narrowly defined and absent specific statutory authority, expert witness fees are not recoverable as costs. *Hayes v. City of Seattle*, 131 Wn.2d 706, 718, 934 P.2d 1179 (1997). The *Hayes* court held that "[a]lthough RCW 64.40.020 does provide for an award of reasonable attorney fees in addition to costs, it does not explicitly provide for recovery of expert witness fees and we are not inclined to place fees for experts under the umbrella of attorney fees." *Id.* at 718-19. Accordingly, the court should deny Plaintiff's undocumented request for expert fees.

V. CONCLUSION

Public record penalties and fees will be paid out the program funds in Children's Administration that are targeted for assisting children. This Court should deny Plaintiff's request to be awarded the highest possible penalty scheme conceivable. Instead, this Court should award a daily penalty of zero to $15 dollars per day for two "records" as summarized in Appendix A to this Response. Also, Plaintiff's request for attorney fees and costs should be denied because Plaintiff has failed to provide sufficient information to allow an independent lodestar determination by the Court.

DATED this 7th day of November, 2011.

ROBERT M. MCKENNA
Attorney General

JOHN D. CLARK, WSBA #28537
Assistant Attorney General
Attorneys for Defendant

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

CERTIFICATE OF SERVICE

I certify that I served a copy of the DEPT'S RESPONSE TO PLAINTIFF'S PETITION FOR STATUTORY PENALTIES, ATTORNEY FEES AND COSTS, Declaration of Kristal Wiitala, and Declaration of Barbara McPherson with exhibits, on all parties or their counsel of record on the date below as follows:

David P. Moody
Martin D. McLean
Hagens, Berman, Sobol, Shapiro LLP
1918 8th Avenue, Suite 3300
Seattle WA 98101

☐ US Mail Postage Prepaid via Consolidated Mail Service

☒ ABC/Legal Messenger

☐ State Campus Delivery

☐ Hand delivered by _____

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 7 day of November 2011 at Tumwater, Washington.

Beverly Cox
BEVERLY COX, Legal Assistant

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565